LEON F. SCULLY, JR.

IBLA 87-42 Decided September 27, 1988

Appeal from a decision of the Eastern States Office, Bureau of Land Management, rejecting a request to amend lease ES 32989.

Reversed in part and remanded; affirmed in part.

1. Contracts: Generally--Oil and Gas Leases: Generally--Oil and Gas Leases: Noncompetitive Leases

   The signing of an over-the-counter oil and gas lease offer by the authorized officer of the Bureau of Land Management is the act that constitutes issuance of the lease and creates a binding contract.

2. Administrative Procedure: Burden of Proof--Evidence: Burden of Proof--Evidence: Presumptions--Evidence: Sufficiency

   There is an established legal presumption, which may be rebutted, that official acts of public officers discharging their official duties are regular. That presumption can be rebutted by substantial evidence tending to show that BLM's action was not regular in a particular instance. If such a showing is made, the Board decides the case without further reference to the presumption, and the appellant must prove his case by a preponderance of the evidence.

APPEARANCES: Leon F. Scully, Jr., pro se; Mary Katherine Ishee, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Leon F. Scully, Jr. has appealed from a decision of the Eastern States Office, Bureau of Land Management (BLM), dated September 3, 1986, rejecting appellant's request to amend over-the-counter noncompetitive lease ES 32989 to include the W\ of sec. 36, T. 15 N., R. 12 W., Michigan Meridian.

On October 27, 1983, appellant filed over-the-counter noncompetitive lease offer ES 32989, requesting both the above described parcel and the

E\ of sec. 35, T. 15 N., R. 12 W., Michigan Meridian. The lands described in the offer are acquired lands under the surface management authority of the U.S. Forest Service. The lease was signed by the authorized officer on September 27, 1984, with an effective date of October 1, 1984. The signed copy of the lease in the record describes, under Part 3 of the lease, "Land included in lease," only the E\ of sec. 35, except 7.44 acres in a railroad right-of-way, for a total of 308.72 acres. However, the land description for leased lands on the signed copy of the lease in the record was at some point altered, the effect of which will be discussed in detail below.

In a decision dated October 1, 1984, BLM explained to appellant that the lands requested by appellant in sec. 36 had not been included in the lease as finally issued because a Forest Service report indicated that the mineral rights to those lands were not owned by the United States. The BLM date stamp on the Forest Service report shows that it was received by BLM on October 1, 1984, the effective date of the lease and four days after the lease was signed by BLM's authorized officer. The record reflects that prior to receipt of the Forest Service report, all of the lands described in appellant's lease offer had been found to be available for noncompetitive over-the-counter leasing, except the E\ SW^ of sec. 36, 1/ which was within the boundaries of a Known Geologic Structure (KGS) established in 1966, see Memorandum to the State Director from the Assistant District Manager, Milwaukee, dated July 19, 1984, and 6.06 acres within a railroad right-of-way. A memorandum in the record to the case file dated October 29, 1985, indicates that the lease was clearlisted on September 27, 1984, the date the lease was signed by BLM's authorized officer. Prior to BLM's receipt of the Forest Service report on October 1, 1984, there is no other indication in the record that BLM was aware that the lands applied for in sec. 36, other than those included in the KGS, were not available for leasing. 2/ Thus, it appears that had the Forest Service report not been received, the lands available for leasing in the W\ of sec. 36 would have been included in the lease as issued.

Upon receipt of BLM's October 1, 1984 decision rejecting in part his lease offer, appellant requested a stay of the decision in order to provide

1/ The report states that the SE^ SW^ is in the KGS but the 1966 KGS report and attached map indicate that the E\ SW^ is in the KGS. While the discrepancy in this report cannot be explained from a review of the record, the correct land description was used on the lease form for lands included in the lease. Appellant reports that he submitted a withdrawal as to the parcel shown to be within the 1966 KGS. Appellant's Statement of Reasons at 2.

2/ In a March 23, 1984 memorandum from the Forest Service Eastern Region's Assistant Director for Watershed and Minerals Management to the Director, BLM Eastern States Office, the Forest Service stated that lands described in lease offer ES 32989 had previously received Forest Service review and consent in a report dated March 15, 1983. That review was for lease offer ES 27813 previously filed by appellant. That lease offer was withdrawn by appellant in a letter to BLM dated March 27, 1983.

documentation that the mineral rights in the W\ of sec. 36 had revested in the United States. Accordingly, in a decision dated November 20, 1984, BLM agreed to "reconsider" appellant's offer to lease the W\ of sec. 36. Appellant then submitted an abstract and title opinion showing that under Michigan law, the mineral rights had in fact revested in the United States. In a written report, counsel for both the Forest Service and BLM concurred in the documentation provided by appellant. Thus, contrary to the conclusion in the Forest Service report received by BLM on October 1, 1984, the lands in the W\ of sec. 36, outside the KGS and the railroad right-of-way, were ultimately shown to be available for leasing.

Once the status of the mineral rights in those lands was established as being in the United States, BLM recommenced consideration of leasing the lands to appellant. However, effective December 25, 1985, the lands in the W\ of sec. 36 were placed in the Newaygo-Mecosta KGS, thus making the lands unavailable for noncompetitive leasing. See Memorandum to State Director from Milwaukee District Manager dated January 17, 1986. Accordingly, on September 3, 1986, BLM issued its decision rejecting appellant's request to have lease ES 32989 amended to include the W\ of sec. 36.

Appellant has not contested the Newaygo-Mecosta KGS determination. He asserts, however, that he is entitled to a noncompetitive lease for the lands in question. He claims that when lease offer ES 32989 was signed on September 27, 1984, by BLM's authorized officer, the description of leased lands included the available acreage in the W\ of sec. 36. Appellant alleges that on October 1, 1984, subsequent to signing the lease on September 27, 1984, and after BLM received the Forest Service report indicating the mineral interests were not in the United States, but before a copy of the executed lease was sent to appellant, the lease form was altered to show that only lands in the E\ of sec. 35 were included in the lease. Appellant asserts that the alleged alteration of the lease was contrary to law and that he is entitled to a lease including the lands in the W\ of sec. 36 available for leasing at the time the lease was issued.

[1] An offer to lease is accepted and the lease issues when the authorized officer signs the lease form offered by the applicant. 43 CFR 3110.1-2. In Barbara C. Lisco, 26 IBLA 340, 344 (1976), the Board observed:

> The Department has recognized that upon signature of a lease by both parties, it becomes a binding instrument and cannot be vitiated by unilateral action, all else being regular. Charles D. Edmonson et al., 61 I.D. 355, 363 (1954). See Stephen P. Dillon, 66 I.D. 148, 150 (1959); R. S. Prows, 66 I.D. 19, 21 (1959). 3/

3/ "The Government's rights and obligations as lessor of public lands are no different from those of any other lessor. United States v. General Petroleum Corp., 73 F. Supp. 225, 234 (S.D. Cal. 1946), aff'd, Continental Oil Co. v. United States, 184 F.2d 802

> (9th Cir. 1950). The rules of construction applicable to Government Contracts are the same rules applied to contracts between private parties. * * *" Standard Oil Co. of California v. Hickel, 317 F. Supp. 1192, 1197 (D. Alaska 1970), aff'd per curiam, 450 F.2d 493 (9th Cir. 1971).

Thus, in both the regulations and departmental precedent it is clear that when the lease is signed by the authorized officer, the lease is issued and becomes binding. This principle is especially important in light of appellant's allegation that the land description on the lease form for lease ES 32989 was altered after the lease form was signed by the authorized officer to exclude the lands in the W\ of sec. 36. If the lands in sec. 36 were included in the land description of the lease at the time the lease was signed, they became part of the lease, and a subsequent alteration of the description to delete that part of the land description would not change the result.

An over-the-counter noncompetitive offer to lease may be accepted in whole or in part. 43 CFR 3111.1-1(e). It is proper, as counsel for BLM points out, for BLM to reject an oil and gas lease offer on lands the title of which is in controversy. Eldin L. R. Johnson, 47 IBLA 366 (1980). However, once the lease has been issued, i.e. signed, and information is subsequently received indicating the lands described on the lease form as "included in lease" 3/ are not available for leasing, the proper procedure is to cancel the lease as to those lands. See Hanes M. Dawson, 101 IBLA 315 (1988); cf. Carl J Taffera, 71 IBLA 72 (1983).

[2] Appellant's allegation must be considered in light of applicable standards of review. There is an established legal presumption that official acts of public officers discharging their official duties are regular. Homestake Oil and Gas Co., 95 IBLA 61 (1986). This presumption may, however, be rebutted. As the Board explained in R. C. Wilcox, 63 IBLA 19, 21 (1982):

> That presumption can be rebutted by any substantial evidence tending to show that BLM's action was not regular in a particular instance. If such a showing is made, the Board decides the case without further reference to the presumption, and the appellant must prove his case by a preponderance of the evidence. H. S. Rademacher, 58 IBLA 152 (1981). [Emphasis in original.]

See also Richard A. Willers, 101 IBLA 106 (1988), and Elizabeth D. Anne, 66 IBLA 126 (1982), both holding that the presumption is overcome by circumstances shown to exist which make it "more likely than not" that regular agency practices were not followed.

3/ The portion of the lease form describing the leased lands is to be completed only by BLM.

In response to appellant's assertion, BLM states:

> On September 27, 1984, * * * the BLM authorized officer signed appellant's lease offer for the E\ of Sec. 35, except 7.44 acres in a railroad right of way. Although Mr. Scully had applied to lease the W\ of Sec. 36 as well, the executed lease did not include that parcel. On October 1, 1984 BLM received the [Forest Service report], and on that same day, i.e. October 1, 1984, BLM issued a decision rejecting Mr. Scully's offer to lease the W\ of Sec. 36 * * *.

Thus, BLM denies that the executed lease included the W\ of sec. 36. It is unclear, however, at what point BLM is contending the lease was "executed." 4/ BLM does not directly deny the allegation that the lease form was altered after signing and issuance. Rather, in its answer, BLM denies that the lease was even altered: "[T]he lease record in the BLM's file * * * [does not] show any evidence of alteration" (BLM Answer at 4). This statement, however, is erroneous. An examination of the signed copy of the lease in the record file clearly shows that the description of the lands included in the lease was altered by using typewriter correction fluid to obliterate part of the description and to change the information concerning the number of acres leased and the amounts owed for annual rental. Further, upon closer examination, one can discern that the obliterated land description is "Sec. 36 NW^, W\ SW^ except 6.06 acres in RR R/W," thus describing the lands in the W\ of sec. 36 considered by BLM available for leasing prior to receipt of the Forest Service report.

BLM also points out that appellant has provided no signed copy of the lease with an unaltered description showing the W\ of sec. 36 to be included within the lease, and in contrast to appellant's position, suggests the following possibility:

> It is quite possible that either the Office of the General Counsel or the Forest Service informally communicated the lack of title to BLM, especially since the Forest Service had in July stated that

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4/ BLM states: "Whatever the proximity of events surrounding lease issuance, the appellant only received, and BLM only issued, a lease to the E\ of Sec. 35" (BLM Answer at 4). It is not clear that BLM is arguing that receipt is critical, but any implication that receipt of the lease by appellant is dispositive must be rejected. As the Board stated in Barbara C. Lisco, supra at 344: "Issuance of a lease is accomplished by the signature of the appropriate officer. 43 CFR 3111.1-1(c) [now 43 CFR 3111.1-1(e)]. This same regulation provides that a copy of the executed lease will be sent to the lessee, but it does not nor does any other relevant regulation invest mailing/delivery with any legal significance." [Emphasis in original.] Thus, the fact that appellant may never have actually received an executed lease including the W\ of sec. 36 is immaterial if the lease was signed and then altered and sent in its altered form to appellant.

> they gave consent to issuance of the lease. [5/] BLM may have chosen to wait to issue the decision rejecting appellant's offer as to the W\ of Sec. 36 until they officially received the Forest Service title report stating that the minerals were privately owned.

While BLM has set forth a possible explanation of the alteration, it fails to indicate anything in the record or provide any other evidence to show that this was the progress of events. In contrast, the state of the record as pointed out by appellant clearly supports his assertions that the lease was altered. There is nothing in the record prior to lease issuance to indicate the need to alter the lease description before it was signed by the authorized officer. To the contrary, all indications were that the land in sec. 36 on that date was available for leasing. Moreover, BLM was in the best position to provide the sequence of events surrounding execution of the lease, yet it erroneously claims the lease was not altered and then states that it is "quite possible" that the Office of General Counsel orally communicated with BLM. Either BLM received an oral communication or it did not. The record fails to show that it did.

Appellant has provided other information which we find supports the finding that the lease was altered after signing. He states:

> The lease copy I was sent * * * was a Xerox certified copy with the 308.72 acre figure. Customarily the lessee is sent an executed lease on one of the original offer forms (at that time yellow) signed by both the offeror and the authorized officer * * *.

(Statement of Reasons at 5). Appellant's assertion that he was sent a photocopy of the signed lease and not an originally signed copy of the lease has not been refuted by BLM. The Departmental regulation in force at the time of lease issuance, 43 CFR 3111.1-1(e), provided that a "signed copy of the lease shall be mailed to the offeror." Appellant's unrefuted assertion is disturbing for two reasons. First, BLM in its answer places much emphasis on the fact that the lease received by appellant did not show any signs of alteration. But, given the type of alteration appearing on the lease form in the casefile, it is reasonable to conclude that the alteration would not have been evident on a photocopy of a signed lease form. In fact, it would only be after reviewing the casefile that one would find evidence of alteration. Thus, because appellant was sent a photocopy, he was at a disadvantage since he could not discover the alteration without actually reviewing the casefile. Second, as noted by appellant, issuance to the lessee of a photocopy of the lease agreement was contrary to the standard practice of sending a signed copy and contrary to the mandate in 43 CFR 3111.1-1 to send a signed copy of the lease issued to lessee. While issuance of a photocopy alone would not suggest an alteration on the lease form

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5/ The Forest Service communicated this information to BLM in the March 23, 1984 memorandum to the Director, Eastern States Office.

after signing, when considered in light of the other evidence previously examined, it further supports the conclusion that BLM's actions in this instance were irregular. 6/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from to reject appellant's request to amend lease ES 32989 is reversed. This case is remanded with instructions to BLM to issue noncompetitive lease ES 32989 to include those lands in the W\ of sec. 36 that were available for leasing on September 27, 1984, i.e. Sec 36, NW^, W\ SW^ except 6.06 acres in the railroad right-of-way. The decision to increase the annual rental to $2.00 per acre is affirmed and shall apply to all leased acreage in lease ES 32989.

Franklin D. Arness
Administrative Judge

I concur:

Bruce R. Harris
Administrative Judge

6/ We note that Scully asserts that in July 1984 he was in the Eastern States Office, learned that his offer had been structurally cleared, and requested and received a photographed copy of the offer. He included a copy of that document as Exhibit A to his statement of reasons. That copy showed, under lands included in the lease, the following description for lands in sec. 36: "Sec. 36 NW1/4 SW1/4, SW1/4 SW1/4, SE1/4 SW1/4." Scully contends that he thereafter contacted ESO to inquire why the NW1/4 sec. 36 was not to be included in the lease. This contention is borne out by a Sept. 17, 1984, memorandum in the file from the Eastern States Office to Milwaukee District Office requesting structural clearance for the offer, stating: "The NW1/4, sec. 36 was inadvertantly [sic] left off description when originally sent for clearance." Scully alleges that "[s]tructural clearance I understand was obtained verbally shortly thereafter" (SOR at 3). The offer form from which Exhibit A was photocopied is missing from the record transmitted to the Board. Another copy of the offer was clearly used for the Sept. 27, 1984, lease issuance.